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In the Supreme Court of the United States

OCTOBER TERM, 195

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 483

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 10, 1951, and modified on September 21, 1951.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65)[1] is reported at 189 F. 2d 665.

[1] The abbreviation "R." refers to the printed Joint Appendix; the abbreviation "Tr." refers to the original record which is on file with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, and modified on September 21, 1951 (R. 73, 76–77). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Idaho Power Company applied to the Federal Power Commission for a license to construct, operate, and maintain a hydroelectric project, including a dam, power plant, and transmission lines, occupying for the most part lands of the United States. An order was granted authorizing issuance of the license on the condition, among others, that the United States have the right at its own expense to interconnect with the project transmission lines and to transfer power over them, at rates of compensation either agreed upon or fixed by the Commission, in such amounts as will not interfere with the Company's use of the lines.

The questions presented are:

1. Whether the Court of Appeals is authorized to strike the condition from the order as unauthorized by law, and to affirm the order as modified without affording the Federal Power Commission, in the exercise of its primary jurisdiction, an opportunity to determine whether the issuance of the license without the condition satisfies the applicable standards of public interest.

2. Whether the Federal Power Commission has authority under Part I of the Federal Power Act to condition the issuance of a license for the construction on and over public lands of a hydroelectric project, including transmission lines, upon the licensee's transmission of Government power over the proposed lines to the extent of their excess capacity.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et. seq.*) may be found in a pamphlet copy of the Act submitted with this petition. Other pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 31–35.

STATEMENT

The Idaho Power Company filed a petition in the Court of Appeals for the District of Columbia Circuit, under Section 313 (b) of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) and under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), to review, among other things, the inclusion of certain conditions in two orders of the Federal Power Commission, dated October 13, 1949, and January 18, 1950, authorizing issuance of a license for the construction on lands of the United States of a hydroelectric project (R. 1–7).

The orders authorized issuance of a license under Part I of the Federal Power Act for the

construction, operation, and maintenance, on and along the Snake River, Idaho, of a hydroelectric power project, known as the Bliss development, consisting of a dam, powerhouse, transformers, a switchyard and two transmission lines (R. 44, 46–47).

On August 22, 1947, the Idaho Power Company filed with the Commission, under Section 4 (e) of the Act, its application for a license for the project (R. 12). On March 2, 1948, the Commission authorized issuance of a major license (R. 12–16), but reserved "the right to determine at a later date what transmission facilities should be included in the license as part of the project" (R. 16). On April 20, 1949, after first having sought to obtain a permit for transmission lines in the same area from the Department of the Interior (R. 23), the Company applied for an amendment of its original application to include as part of the project two proposed high-voltage primary transmission lines (R. 17, 66).

One of these lines leads northwesterly from the Bliss Plant to a point near the City of Boise, and the other easterly to a point near the City of American Falls, both in the State of Idaho, at which points the lines join with the Company's interconnected transmission system (R. 42–43). The Boise line, approximately 73 miles long, crosses lands of the United States for a distance of 31.6 miles (R. 43). The American Falls

line, approximately 116 miles long, crosses lands of the United States for a distance of 93.7 miles (R. 43). Thus, the total line length over lands of the United States is approximately 125 miles (R. 43). Of such line mileage crossing lands of the United States, 97.9 miles cross open public lands and 27.4 miles are upon reservations of the United States.

In response to inquiry from the Commission concerning the amended application, the Secretary of the Interior advised the Commission that on July 9, 1948, the Company applied to the Bureau of Land Management of the Department for a permit to construct over public lands a transmission line which was to extend between Boise and American Falls, Idaho (R. 23–24). He also stated that the Department has for some time been concerned with the supply of power in the southern part of Idaho and that the Federal Government had hydoelectric projects in the area, and other federal projects are either under construction or authorized to be constructed (R. 24). Prior to Idaho Power Company's application for a permit to erect the transmission lines over the public lands, the Bureau of Reclamation and the Bonneville Power Administration prepared a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which proposed

that the United States construct, own, and operate a transmission line connecting the eastern and western parts of the southern Idaho region (R. 24), the same area served by the two proposed transmission lines involved here. This report was transmitted to the Idaho Power Company with a request for a conference to explore the possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible (R. 24).

In negotiations with the Department of the Interior, the Company resisted the suggested condition that the unused capacity of the line over government lands be made available for transmission of government power upon payment of just compensation (R. 24). On April 11, 1949, nine days before the filing of its amended application with the Federal Power Commission (*supra*, p. 4), the Company withdrew its application from the Department of the Interior (R. 24, 17).

The Secretary of the Interior also urged upon the Commission that the proposed transmission lines were intended as main trunk lines, subject to his jurisdiction, and not project lines within the Commission's jurisdiction. (Tr. 167, 216, 242). He stated that the Company originally planned to place the power from the Bliss project on its existing lines at the Hagerman switchyard by means of a relatively short transmission line (Tr. 168), and charged that the application for an amendment to the Company's license was filed not in good faith

but for the purpose of ousting his jurisdiction (Tr. 242).[2]

On October 13, 1949, the Commission entered an order superseding its order of March 2, 1948 (*supra*, p. 4), which reauthorized the license for the Bliss project, including the two proposed transmission lines (R. 41). Among other special conditions, this order contained paragraph (F), as a result of suggestions of the Secretary of the Interior (R. 33–37, 44). This required, as a condition of the license, that the licensee permit the interconnection of transmission facilities of the United States with the two licensed transmission lines, and the transfer over those lines of energy generated in power plants owned by the United States "in such amounts as will not unreasonably interfere with the licensee's use of said lines" (R. 50). The Company is compensated for such transmission of Government power (R. 51).

[2] A "project" is a complete unit of hydroelectric development. See Section 8 (11) of the Federal Power Act. Only primary lines transmitting power from the unit to the distribution system may be considered part of the project. *Ibid.* Transmission lines on and over government lands intended for other purposes would not be within the licensing authority of the Federal Power Commission and would remain subject to the jurisdiction of other governmental agencies. See *Pacific Power & Light Co.* v. *Federal Power Commission*, 184 F. 2d 272 (C. A. D. C.). An earlier suit brought to enjoin construction of the transmission lines involved here did not deal with whether they were "project" lines but only with the initial jurisdiction of the Commission to determine the question upon the filing of a license application. *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho).

The Commission found, among other things, in accordance with the statutory requirement (Section 10 (a)), that "under present circumstances and conditions and upon the terms herinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes" (R. 45).

After the amended license had been authorized with the above condition, the Secretary of the Interior advised the Commission of his understanding that if the Commission was precluded from requiring the condition, the lands involved would be returned to the jurisdiction of the Department so that the terms of its regulations imposing a similar condition might be put into effect (Tr. 259). The Acting Chairman of the Commission replied that he was correct in understanding that the Commission intended to require the condition and that "if the Commission is found to be without jurisdiction the lands will be returned to the Department" (Tr. 260).

The Company's petition for review prayed that the Court of Appeals modify the Commission's order by striking Paragraph (f), remand "the cause to the Commission for further action consistent with the determination of this Court", and grant other appropriate relief (R. 7).

The court below held that Congress had not conferred upon the Commission authority to pre-

scribe the challenged condition. As originally issued on May 10, 1951, the court's opinion directed that Paragraph (F) be eliminated from the Commission's order, and remanded the case to the Commission "for the entry of an order in accordance with this opinion" (R. 74).

The Federal Power Commission thereafter moved for clarification of the judgment, stating that it was not clear "whether the opinion and judgment requires the Commission to enter an order in the exact form of the original order, after eliminating paragraph (F), or whether the Commission is free to reconsider the remainder of the order and to enter such other order as it deems warranted in the exercise of its administrative discretion under the Federal Power Act" (R. 74).

On September 21, 1951, the court modified its earlier opinion by eliminating language relating to remand and substituted the following (R. 76–77):

> The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 860 (1935), 16 U. S. C. A. Sec. 825l (b).

On September 24, 1951, the court recalled the opinion and judgment previously issued to the Federal Power Commission and directed the clerk to issue certified copies of the opinion and judgment as modified by the order of September 21, 1951 (R. 77).

REASONS FOR GRANTING THE WRIT

Two questions of importance are presented by the decision below: (1) The scope of the Court of Appeals' authority to modify orders of the Federal Power Commission without remanding the cause to permit the Commission, in the exercise of its primary jurisdiction, to make the appropriate administrative determination, and (2) the authority of the Federal Power Commission under Part I of the Federal Power Act to require, as a condition to the exploitation of public resources and the use of public lands for the development and transmission of hydroelectric power, that the licensee transmit energy of the United States.

I

The Federal Power Act authorizes the Federal Power Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects which are "necessary or convenient * * * for the development, transmission, and utilization of power * * * upon any part of the public lands and reservations of the United States." Section 4 (e). Under the statute, "each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe" (Section 6), and one of the specific conditions is that the project be such "as in the judgment of

the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." Section 10 (a).

The Commission is further authorized "if necessary in order to secure such plan * * * to require the modification of any project and of the plans and specifications of the project works before approval" (*ibid.*), and to impose, in its discretion, "such other conditions not inconsistent with the provisions of this Act" as it may require. Section 10 (g). Compare Section 7 (b).

Orders of the Commission are reviewable in the courts of appeals which "have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part," but are bound by the Commission's findings of fact "if supported by substantial evidence." Section 313 (b).

The Federal Power Act thus places in the Federal Power Commission initial responsibility to determine whether a proposed hydroelectric project on lands of the United States is best adapted to a comprehensive plan for the improvement and utilization of water power development. In this case, the Commission has determined that the Bliss project will conform with these statutory standards if the Company is required, as part of its license, to carry government power over its project lines. But the Commission has not determined, and it has not had the opportunity to decide, whether the project will fulfill the Act's

commands if this significant condition is eliminated.

By requiring issuance of the license without further proceedings before the Commission and without the condition deemed appropriate by the Commission, the court below has disregarded the principle reiterated in numerous decisions of this Court that, where Congress has reposed primary jurisdiction to make a policy or factual determination in an administrative agency, the courts will stay their hands until the administrative agency endowed with its particular experience has had an opportunity to act.[3]

Several of these decisions present striking analogies to the case at bar. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, after sustaining the Commission's order with the exception of two provisions, the Court stated that "since the qualifying clauses constitute an important limitation

[3] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612–614; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432–433; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–374; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, 301; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 437–438; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444, 448; see also *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437; *United States* v. *Jones*, 336 U. S. 641, 652–653, 670–671, 672–673.

to the provisos; we think the Commission should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary." 334 U. S. at 55.

Similarly, in *Addison* v. *Holly Hill Co.*, 332 U. S. 607, the Court held that the invalid part of a definition committed by Congress to administrative determination could not be excised and the remainder applied. "We can hardly assume that the Administrator would have defined 'area of production' merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty." 332 U. S. at 618–619. Accordingly, judicial action was stayed to await appropriate administrative action.

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, an error of law in the Commission's determination was held not to "foreclose the administrative agency, after its error has been corrected, from enforcing a legislative policy committed to its charge." 309 U. S. at 145. It was "the Commission's responsibility * * * to measure applications by the standards of 'public convenience, interest, or necessity'" (*ibid.*). The determination that the

Commission had misconceived the Pennsylvania law in determining the public interest exhausted the judicial power, and "the Commission was again charged with the duty of judging the application" by the statutory standard (*ibid.*).

And in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, where complete suppression by the Federal Trade Commission of misleadingly used trade names was held too drastic, the Court did not attempt to correct the order but stated that "this is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine." 288 U. S. at 218.

Inherent in the decision below is the assumption that the court was authorized to decide, as an original matter and without any prior action by the Commission, that the proposed project, without the important condition, was "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." This assumption, as shown, is contrary to all modern learning in the field of administrative law. Moreover, the finding implicit in the court's decision was based upon a barren record, since no hearings on this question had been held by the Commission, and the question does not appear to have been presented to the court below (R. 61).

Acquiescence by the Secretary of the Interior in the jurisdiction of the Commission and in the is-

suance of the license resulted from imposition of the condition in question (R. 57–58; Tr. 258). *Supra*, pp. 5–8. By its action, the court below has deprived the Secretary of the Interior of opportunity for a full hearing on his objections before the Commission, and of the possible opportunity for review on an appropriate record of an adverse order by the Commission.

Perhaps an even more fundamental objection to the powers assumed by the court below is that they constitute the exercise of an administrative rather than a judicial function. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266. If Congress had intended to establish the Court of Appeals as "a superior and revising agency in the administrative field," then "its decision was not a judicial judgment reviewable" by the Supreme Court. 289 U. S. at 274; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. But Congress obviously had no such intention because Section 313 (b) specifically provides that the judgment of the reviewing court shall be "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in * * * the Judicial Code, as amended."[4]

[4] Moreover, the other provisions of Section 313 (b), relating to the conclusiveness of the Commission's findings of fact "if supported by substantial evidence," and to the procedure for taking additional evidence, clearly con-

The statutory provision authorizing the court "to affirm, modify, or set aside such order in whole or in part" (Sec. 313 (b)), does not permit judicial action without a primary determination by the Commission of the matter in issue. This language is similar to that authorizing judicial modification of the administrative order in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, where the "familiar appellate practice" of remanding causes to the administrative agencies for appropriate action is described (305 U. S. 373–374), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608; and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (all cited in fn. 3, *supra*, p. 12), where judicial disagreement with administrative action resulted in remand rather than exercise by the courts, in the first instance, of the agency function.[5]

It is clear, then, that the proper procedure was to remand the cause to the Commission for

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template the traditional relationship between the administrative agency and the reviewing court.

[5] This Court has affirmatively indicated that it regards judicial review under the Federal Power Act as essentially the same as the traditional limited review of administrative action. *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, note 3; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; see also, *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F.

further proceedings consistent with the court's opinion. This would permit the primary determination by the Commission of compliance with the statutory standards, in the absence of the prescribed condition.[6] Its new findings would, of course, be conclusive if supported by substantial evidence on the record as a whole. In precluding the exercise of such administrative judgment by eliminating a condition found appropriate by the Commission to satisfy the statutory standard of public interest, and by making the order effective without the condition, the court below plainly contravened established standards of judicial review.

II

Review of the holding that the Federal Power Commission has no authority to require transmission over licensed lines of government power as a condition to a license to use public lands for private transmission lines is important because (a) there has been a large increase in the con-

[6] The Commission's finding on the original application, that the statutory standard had been satisfied without the condition here in question, did not relate to the transmission lines which were not described in that application. The condition was later imposed because of the amended application for a license to construct transmission lines, which are an important part of the project (R. 21). *Supra*, pp. 4, 7. The prior findings, therefore, are not relevant to this aspect of the project. The adequacy of the Commission's finding, as a factual matter, that the condition to the license for the transmission lines was necessary to satisfy the statutory

struction of federal power projects since 1935, and the ruling below will, therefore, have a wide impact, (b) the regulations of the Department of the Interior in a closely related field require such carrying of federal power, and (c) the court's interpretation of the Commission's authority under Part I of the Federal Power Act is erroneous

(a). The Court of Appeals' decision entirely forecloses the Commission from taking account of the need for wheeling arrangements in the public power program, a problem which the activities of the Federal Government in the development of hydroelectric power in recent years have made one of great magnitude.[7]

The construction of power plants by the United States was more or less limited until the past decade. Plants were not usually located so as to require more than a few transmission lines, and interconnections with non-Federal power systems could be achieved in the few instances where desirable without resort to wheeling arrangements. In 1935, Congress authorized construction of the Bonneville Dam by the Army Corps of Engineers (Act of Aug. 20, 1935, Sec. 1, 49 Stat. 1028, 1038) and in the same Act authorized the President, through his designated

[7] Wheeling arrangements are arrangements for the transmission of another's electric power over one's lines. The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission.

agent, to construct, operate, and maintain the Grand Coulee Project (49 Stat. 1040).

With the impending completion of the Bonneville Dam, Congress in 1937 authorized a temporary form of administration, pending establishment of a permanent administration embracing other Columbia Basin projects (Act of Aug. 20, 1937, 50 Stat. 731, as amended, 16 U. S. C. 832–832e). In 1943, Grand Coulee was reauthorized as the Columbia Basin Project, subject to specified provisions of the Reclamation Law (Act of March 10, 1943, 57 Stat. 14, 16 U. S. C. 835–835l). Subsequently, the Bonneville Power Administrator's marketing responsibilities were extended to various other projects (Acts of June 30, 1948, 62 Stat. 1171; June 5, 1944, 58 Stat. 270, 43 U. S. C. 593a–593b; Act of March 2, 1945, sec. 2, 59 Stat. 10, 21; Act of July 24, 1946, sec. 1, 60 Stat. 634, 637). A number of other projects are proposed for the Columbia River basin to relieve the severe power shortage in that area.

The Commission has recently licensed projects now under construction in the Pacific Northwest, which will be coordinated in operation with the Federal projects in the area, and several more applications for non-Federal development are now pending for projects in that region. Interconnections with these plants and others being proposed for licensing are now being seriously considered by the Bonneville Power Administration, the Commission, and the prospective applicants.

In addition to marketing power from a number of projects constructed under the Reclamation Act, the Secretary of the Interior acts as marketing agent for power generated at dams constructed by the Secretary of the Army (Act of December 22, 1944, sec. 5, 58 Stat. 887, 890). For the latter purpose, the Secretary of the Interior has created the Southwestern Power Administration to operate in the States of Arkansas, Louisiana, parts of Kansas, Missouri, Oklahoma, and Texas (Dept. of Int. Order No. 2135, Nov. 21, 1945, 10 F. R. 14527). For a like purpose, he has created the Southeastern Power Administration to operate in the States of West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee and Kentucky (Dept. of Int. Order No. 2558, March 21, 1950, 15 F. R. 1901).

In his Annual Report for 1950, p. 112, the Secretary of the Interior reports that in the fiscal year 1950 he disposed of 24,100,000,000 kilowatt hours of energy at a total revenue of over $59,800,000. The ultimate capacity involved in the projects constructed, under construction, and authorized to be constructed by the Bureau of Reclamation will have a total of approximately 5,950,000 kilowatts (*Ibid.*, pp. 49–51). Of the plants authorized by Congress since 1935 for Federal construction, eight are in operation, with a total capacity of 970,400 kilowatts, 23 plants are under construction with a total capacity of

3,680,175 kilowatts, and funds have been authorized for the construction of 40 more plants with a total capacity of 7,983,600 kilowatts (Report by F. P. C., Sept. 1, 1948, "Federal Hydroelectric Plants").

Wheeling arrangements, similar to the conditions imposed by the Commission in this case, can result in considerable economies to the United States in the construction of transmission and substation facilities whenever a utility system, either privately or municipally owned, can be utilized to transmit power to customers of the United States or to agencies of the United States. Such arrangements, which avoid duplication of facilities, are also plainly essential to the development of a comprehensive plan for the power resources of the area. It is impossible to estimate accurately the number of situations in which such arrangements will be desirable, but Federal transmission networks are being constructed in the Pacific Northwest, in California, in the Missouri River Valley, in the Southwest, and in the Southeast, thereby expanding opportunities for economic interconnections of this character.

(b). Although the Federal Power Commission is authorized to license "project works"[8] upon the public lands and reservations of the United States (Section 4 (e)), the Secretary of the Interior has general authority, "under general regulations

[8] "Project" is defined in Section 3 (11). See also fn. 2, *supra*, p. 7.

to be fixed by him," to permit the use of the public lands, national forests, and other reservations for electrical plants and transmission lines. 43 U. S. C. 957 and 959, *infra*, pp. 31–32. Pursuant to these statutory provisions, the Secretary has promulgated regulations requiring applicants for the use of public land for these purposes to interconnect with federal lines and transmit government power.

These regulations provide that power permits will be granted only where it appears that the proposed development "will be in general accord with the most beneficial utilization of the resources there involved and consistent with the public interest." 43 C. F. R. 245.11. They require applicants to file a stipulation expressly agreeing to accept a power permit subject to the condition that they will permit the Government "to interconnect its transmission facilities with the transmission line of which the line for which the permit is requested forms a part," and to construct the line to make it available to the Government "for the transmission of electric power and energy in such manner and for such amounts as will not unreasonably interfere with the permittee's use of the line." 43 C. F. R. 245.21 (v), *infra*, pp. 34–35.

If the decision below remains standing, the use of public lands for private transmission lines may be conditioned upon the transmission of government power, so long as "project" lines under the

Federal Power Act are not involved, since the decision of the court below is based upon the particular provisions of that Act. The capriciousness of this situation is illustrated in the instant case where the Company first applied to the Department of the Interior for a permit to construct the lines in question and, upon learning of the condition of interconnection, withdrew its application and filed an application with the Federal Power Commission for a license to construct virtually the same transmission lines as part of the project. *Supra*, pp. 5–8. Since power companies, by their own action, may thus bring themselves within the "project" jurisdiction of the Commission, it may be expected that applicants will attempt to take advantage of the difference in agency powers.

(c). In view of the foregoing, the problem of statutory interpretation assumes a special importance which is heightened by the error in the Court of Appeals' ruling. The court recognized the plenary power of Congress over the public lands and its authority to impose conditions without limitation, but held that the authority sought to be exercised by the Federal Power Commission had not been conferred by Congress. This decision was based on the ground that Part II of the Federal Power Act prohibits the Federal Power Commission from requiring interconnection of government lines with private lines, and that Section 10 (g) in Part I of the Federal

Power Act, upon which the Commission in part relied for authority to impose the condition herein, requires all license conditions to be "not inconsistent with the provisions of this Act." The court reasoned that since interconnection cannot be required under Part II, a condition under Part I requiring such interconnection is inconsistent with Part II of the statute.

Despite its superficial plausibility, the fallacy of this reasoning is laid bare by an examination of the history of the present Federal Power Act. The Act embodies three major enactments. The original statute of June 10, 1920, created the Federal Power Commission and established complete machinery for licensing the construction, operation, and maintenance of water power projects. The Act of June 23, 1930, reorganized the Federal Power Commission, substituting an independent agency for the former commission consisting of the Secretaries of the Departments of War, Interior, and Agriculture. The Act of August 26, 1935, provided a scheme for regulation of public utility holding companies by the Securities and Exchange Commission in Title I and amendments and additions to the Federal Water Power Act in Title II.

Title II was itself divided into three parts, relating (i) to amendments to the existing Federal Water Power Act, (ii) to regulation of public utility companies engaged in interstate commerce, and (iii) to both "licenses and public

utilities; procedural and administrative provisions." This title gives the original Water Power Act, as amended, the heading "Part I," and numbers the two new parts as Part II and Part III.

Part I relates exclusively to provisions for the improvement of navigation, the development of water power, and the use of public lands in relation thereto, and the Commission acts through the issuance of licenses to make use of Federal water power and public lands. Before enactment of the 1935 Act there was no express limitation upon the imposition of the requirement involved here as a condition to a license to use public lands.[9]

Part II, added by the 1935 Act, relates exclusively to the regulation of utility companies engaged in the interstate transmission and sale of electric energy. In one aspect of this regulation, the Commission is given power to establish power supply regions and to require interstate utility companies to interconnect and coordinate their transmission and generating facilities. Section 202 (b). Municipalities, states, and the United States are explicitly excluded from the scope of Part II. Section 201 (f).

The court below has held that the Commission lost its authority under Part I to require a pri-

[9] Nor did any of the specific amendments to the Water Power Act, included in Part I of Title II of the 1935 Act, limit or prohibit the imposition of the condition.

vate power company, as a condition to exploiting public resources and using public lands to transmit government power, because authority to require interconnection with existing lines not over government lands was not conferred by Part II. Reliance is placed solely on some testimony of Mr. Dozier De Vane, then Solicitor of the Federal Power Commission, before a congressional committee (R. 70). But Mr. De Vane's prior general explanation of the structure of Title II of the 1935 Act makes clear that Part II was not intended to amend, in any way the licensing provisions of the Water Power Act included in Part I.[10] And Mr. De Vane's specific discussion of interconnec-

[10] (While under discussion before the committees of Congress, what are now referred to as Parts I, II, and III of the Federal Power Act were referred to as Title I, Title II, and Title III, of Title II, respectively.)

Mr. De Vane's testimony is as follows (Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, p. 459):

"Mr. MAPES. Until we get down to Title II of Title II of the bill, the provisions in this bill in Title II, that is in Title I of II, are amendments to the present Federal Water Power Act?

Mr. DE VANE. That is correct, sir.

Mr. MAPES. And, Title II and Title III of Title II, are they entirely new matters?

Mr. DE VANE. Entirely new matters.

Mr. MAPES. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

Mr. DE VANE. The new matter makes no amendments to the licensing sections of the Water Power Act. In Title III of the present Act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled."

tion shows that he was not concerned with the Commission's licensing power under Part I, but only with the new regulatory powers conferred by Part II and the Commission's authority to require interconnection of transmission lines under Section 202 (a) of Part II."

All discussion of "this bill" and the nature of the regulation is consistent only with the pro-

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[11] Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st sess., on H. R. 5423, pp. 514–515:

"Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr. DE VANE. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have [illegible]ceeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance; Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no

visions of Part II. Mr. De Vane's definition (footnote 10) of the two purposes of the bill to "aid State regulation" and "to deal only with rates that State Commissions cannot regulate," applies exclusively to regulation of interstate utilities and has no application to licensing powers of water projects. His testimony (footnote 11) that the act

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transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DE VANE. No, sir.

Mr. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

Mr. DE VANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

Mr. WOLVERTON. I do not think that anybody could be more anxious to be fair.

Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

Mr. DE VANE. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

Mr. WOLVERTON. May I ask, did you participate in the drawing of this bill?

Mr. DE VANE. Of Title II of Title II.

Mr. WOLVERTON. Yes.

Mr. DE VANE. Yes, sir; I participated in it, in making suggestions. I worked on it some; yes, sir."

excludes state, municipal, and Government projects from jurisdiction of the Commission, can only refer to Part II because, as the Solicitor of the Commission, he knew that state and municipal projects had been explicitly made subject to the licensing jurisdiction of the Commission in Part I since 1920. Surely, this answer did not nullify the provisions of Section 4 (e), requiring states and municipalities to obtain licenses from the Commission for the construction of hydroelectric projects. Moreover, Mr. Wolverton's question about "a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State," is pertinent only to jurisdiction under Part II which is based on interstate transmission of energy, and has no application to jurisdiction over licensees for water power projects under Part I. Finally, any possible doubt concerning references to "this bill", throughout the discussion, is entirely removed when Mr. De Vane, in response to Mr. Wolverton's question if he helped "draw up this bill," asked specifically whether Mr. Wolverton was referring to Title II (now Part II) of Title II, and Mr. Wolverton replied, "Yes."

Part II of the Federal Power Act marked a new venture of the Government in the regulation of public utilities, based upon the interstate transmission of electric energy, and constituted a complete departure from the previous system founded on the licensing of the construction and

operation of hydroelectric projects in connection with the use of navigable streams or public lands. Mr. De Vane's testimony did no more than explain that it was not the purpose of the new legislation creating additional regulatory powers to authorize the Commission to require interconnection of private public utility facilities with government lines. To make this clear, Section 201 (f) was added to Part II, providing that nothing "in this Part" was applicable to the United States or other government agencies.

But failure to create authority under Part II to require interconnection in the regulation of the interstate transmission of power by private companies, does not amount to a limitation of pre-existing authority in the licensing of private persons to use public lands and federal water power.[12] The language of Part II is only that certain new powers are created and these new powers do not extend to government lines The decision below would convert the limited grant of additional power into the repeal of authority previously enjoyed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

[12] In fact, only by coincidence will the same persons fall under the purview of both parts of the Act.

APPENDIX

43 U. S. C. 957, 959, 961 provide as follows:

§ 957. Right-of-way to electric-power companies.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power.

§ 959. Rights-of-way for electrical plants, etc.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic,

public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1–6 and 8 of Title 47, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

§ 961. Rights-of-way for electrical poles and lines.

The head of the department having jurisdiction over the public lands is authorized and empowered, under general regu-

lations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there was issued, prior to March 4, 1911, a permit for any of the purposes specified herein under any existing law may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations thereafter making application under the provisions of this section.

43 C. F. R. 245.9 provides as follows:

§ 245.9 *Filing of application.*—(a) All applications for occupancy or use of Interior Department lands, except Indian lands, for power purposes should be submitted in duplicate on Form 1, which is made a part hereof, and filed at the district land office of the land district in which the lands are situated. If the lands are situated in more than one district, the lands in both districts shall be embraced in one set of application papers, which shall be submitted in any one of such districts at the option of the applicant, who shall submit to the district land office in each other district a print copy of the maps submitted to the district land office of the first district. If there is no district land office, the application should be filed with the Director of the Bureau of Land Management, Washington, D. C. (See also, § 245.27.)

43 C. F. R. 245.21 provides as follows:

§ 245.21 *Stipulation required as a condition precedent to the approval of permit.*—The applicant shall file with the application required under § 245.9, a duly executed stipulation expressly agreeing to accept the power permit subject to the following terms and conditions, excepting those which the regional administrator, after clearance with the Division of Power, or such power agency as it may designate for the area involved, may waive in a particular case, to wit:

* * * * * *

(v) Upon such terms and conditions and in such manner as the regional administrator may direct, to permit the Government or any agency or instrumentality thereof,

hereinafter referred to as the Government, to interconnect its transmission facilities with the transmission line of which the line for which a permit is requested forms a part; to construct, operate, and maintain such line and all related facilities, wherever situated, in such manner and condition as to make available to the Government the effective use of such line for the transmission of electric power and energy in such manner and for such amounts as will not unreasonably interfere with the permittee's use of the line; and to permit the Government to so use the line in accordance with the terms and conditions agreed upon by the regional administrator and the permittee, including the terms upon which the Government will pay its proportionate share of the monthly cost of the lines.

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